UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6

MURRAY AMERICAN ENERGY, INC. AND THE MONONGALIA COUNTY COAL COMPANY, A SINGLE EMPLOYER

and **Case 06-CA-215195**

UNITED MINE WORKERS OF AMERICA, DISTRICT 31, LOCAL 1702, AFL-CIO, CLC

MURRAY AMERICAN ENERGY, INC. AND THE HARRISON COUNTY COAL COMPANY, A SINGLE EMPLOYER

and **Case 06-CA-218979**

UNITED MINE WORKERS OF AMERICA, DISTRICT 31, AFL-CIO, CLC

BRIEF OF THE CHARGING PARTIES

COME NOW the charging parties, the United Mine Workers of America District 31 and United Mine Workers of America Local Union 1702, and through undersigned counsel hereby submit this Brief in the above-captioned cases.

I. INTRODUCTION

This bad-faith bargaining case arises under Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the "Act") (29 U.S.C. §§ 158(a)(1), (5)). Charging party United Mine Workers of America ("UMWA" or "Union") District 31 (the "District"), a division of the UMWA International Union, represents bargaining-unit employees at the underground coal mines owned by Respondents Murray American Energy/Monongalia County Coal Company ("Monongalia") and Murray American Energy/Harrison County Coal Company ("Harrison").

Charging party UMWA Local Union 1702 (the "Local") also represents the bargaining-unit employees of Monongalia. Joint Motion & Stipulation of Facts (hereinafter "Stip.") at 6-9. Both Monongalia and Harrison are party to the same collective bargaining agreement with the UMWA. *Id*. at 7.

Under this agreement, nearly all coal-production work at the Respondents' mines is reserved for UMWA members. JX 6, National Bituminous Coal Wage Agreement of 2016 (hereinafter "JX 6"), at 3-8.[1] Yet, Monongalia and Harrison habitually employ subcontractors to perform what appears to the UMWA to be bargaining-unit work, leading to numerous disputes between the parties. Stip. at 13. In an effort to police the Respondents' compliance with the terms of the collective bargaining agreement in the face of this ongoing conflict, UMWA District 31 and UMWA Local Union 1702 made numerous requests to Monongalia and Harrison, over a four-month period, for information regarding the subcontractors' work. *Id*. at 9-12; JX 7, 1/23/18 Email from Jeff Reel to Jim Travelstead (hereinafter "JX 7"); JX 9, 1/29/18 Email from Jeff Reel to Jim Travelstead (hereinafter "JX 9"); JX 10, 1/31/18 Email from Jeff Reel to Jim Travelstead (hereinafter "JX 10"); JX 13, 2/6/18 Email from Jeff Reel to Jim Travelstead (hereinafter "JX 13"); JX 15(a), 2/15/18 Email from Jeff Reel to Cory Barack (hereinafter "JX 15(a)"); JX 15(b), 2/12/18, 6:32 p.m. Email from Jeff Reel to Jim Travelstead (hereinafter "JX 15(b)"); JX 16, 2/12/18, 5:45 p.m. Email from Jeff Reel to Jim Travelstead (hereinafter "JX 16"); JX 18, 2/19/18 Email from Jeff Reel to Jim Travelstead (hereinafter "JX 18"); JX 24, Email from Mike Phillippi to Cory Barack (hereinafter "JX 24").

[1] The joint exhibits to the Joint Motion and Stipulation of Facts in this matter are designated "JX."

In nearly all cases, the Respondents failed to provide the information, in violation of the Act. On the one occasion that the UMWA did receive information in response, it came nearly two months after the Union requested it – in further violation of the Act. *Id*. at 13. Moreover, the Respondents unlawfully conditioned their willingness to reply to the Union's requests for information relevant to its representational duties on the Union's reimbursement of the Respondents' costs, without providing any evidence that those costs were at all burdensome to the Respondents. JX 17, 2/14/18 Letter from Cory Barack to Jeff Reel (hereinafter "JX 17"), at 2; JX 19, 2/20/18 Letter from Cory Barack to Jeff Reel (hereinafter "JX 19"); JX 21, Letter from Cory Barack to UMWA District 31 (hereinafter "JX 21"); JX 28, Letter from Cory Barack to Mike Phillippi; JX 30(a), 1/28/19 Letter from Cory Barack to Matt Miller, at 1 (hereinafter "JX 30(a)"); JX 30(b), 3/5/19 Letter from Cory Barack to Matt Miller, at 1 (hereinafter "JX 30(b)"); JX 32, Letter from Cory Barack to Laura Karr, at 1. The UMWA was under no obligation to make such a payment and did not do so.

Plainly, the UMWA made lawful requests for relevant information regarding subcontractors working at Monongalia and Harrison, and the Respondents unlawfully failed to provide a substantial majority of it while unlawfully delaying the provision of a small amount of the requested material. Such failures are clear examples of bad-faith bargaining that impermissibly limit the Union's ability to represent its members at Monongalia and Harrison by making it impossible for the UMWA to determine whether the Respondents are violating the parties' collective bargaining agreement by awarding bargaining-unit work to subcontractors. Given the Respondents' inability to produce any evidence at all that the cost of responding to the Union's requests was burdensome to Monongalia and Harrison, each of which take in over $100 million in revenue each year, the UMWA was under no obligation to reimburse the Respondents

for such costs or to bargain regarding their allocation. Stip. at 5. Instead, the UMWA was and is entitled to the information it requested, at the Respondents' expense, and the Respondents must provide the information without further delay.

II. STATEMENT OF THE CASE

The factual record in these cases is contained in the Joint Motion and Stipulation of Facts and accompanying Joint Exhibits but is summarized here for convenience.

A. Parties

Both UMWA District 31 and UMWA Local Union 1702 are, and at all times material to these cases were, labor organizations under the Act. *Id*. at 6. At all material times, Respondent Murray American Energy, Inc. ("Murray") mined and sold coal through subsidiaries including Monongalia and Harrison. *Id*. at 5. Murray and Monongalia are a single employer, as are Murray and Harrison. *Id*. at 5-6. Both the Murray/Monongalia single employer entity and the Murray/Harrison single employer entity are, and were at all material times, employers engaged in commerce under the Act. *Id*. at 6. Both entities are, and at all material times were, party to the National Bituminous Coal Wage Agreement of 2016 (the "NBCWA") with the UMWA. *Id*. at 7-9. Under the NBCWA, the bargaining units at Monongalia and Harrison include all employees who are:

> …engaged in the production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal…repair and maintenance work normally performed at the mine site or the central shop…and the maintenance of [waste] piles and mine roads, and work of the type customarily related to all of the above.

Id. at 8.

B. Procedural History

The Local filed the charge that gave rise to case 06-CA-215195 on February 20, 2018 and amended it on July 20, 2018. *Id*. at 3; JX 1(a), 2/20/18 Charge against Employer; JX 1(c), 7/20/18 Charge against Employer. The District filed the charge that gave rise to case 06-CA-218979 on April 23, 2018 and amended it on August 24, 2018. Stip. at 3; JX 1(e), 4/23/18 Charge against Employer; JX 2(a), Order Consolidating Cases, Consolidated Complaint & Notice of Hearing (hereinafter "JX 2(a)"), at 12. The General Counsel of the National Labor Relations Board (the "Board") consolidated these matters and issued a complaint on August 31, 2018; the General Counsel then amended it on July 23, 2019. Stip. at 4; JX 2(a); JX 4(a), Amendment to Consolidated Complaint.

Hearing in this matter was set initially for December 12, 2018 but was postponed to allow for the investigation by the Board's Region 6 of charges related to those at issue here. JX 1(g), Order Postponing Hearing Indefinitely. The hearing was then rescheduled for August 12, 2019. JX 1(i), Order Rescheduling Hearing. It was later rescheduled again for September 4, 2019. JX 1(m), Second Order Rescheduling Hearing. On August 15, 2019, the parties submitted this matter to the Board for consideration based on their Joint Motion and Stipulation of Facts. Stip. at 15. The Board granted the motion on October 2, 2019. Order Approving Stipulation, Granting Motion, and Transferring Proceeding to the Board at 3.

C. Facts

The NBCWA reserves for bargaining unit members all work involving:

> …the production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal…repair and maintenance work normally performed at the mine site or the central shop…and the maintenance of [waste] piles and mine roads, and work of the type customarily related to all of the above.

JX 6 at 3. The NBCWA also sets strict limits on subcontracting, requiring any such work to "be conducted in accordance with the provisions of" the agreement. *Id*. Those provisions allow employers, including Monongalia and Harrison, to subcontract only three types of work and to do so only under certain specific circumstances.

First, the employer may subcontract "the transportation of coal…where contracting out such work is consistent with the prior practice and custom of the Employer at the mine." *Id*. at 7. However, even when this condition is satisfied, the employer may not subcontract "when any Employees at the mine who customarily perform such work are laid off." *Id*. Second, the employer may subcontract "repair and maintenance work" when the subcontractor in question is an equipment manufacturer or supplier performing work under an equipment warranty or when the employer lacks "available equipment" or bargaining-unit employees, including laid-off employees, with the skills necessary to perform the work. *Id*. Third, the employer may subcontract "construction of mine or mine related facilities…customarily performed by" bargaining-unit employees but only when all employees with the skills necessary for the work "are working no less than 5 days per week, or its equivalent for Employees working on alternative schedules." *Id*. at 8.

The parties have agreed that no other subcontracting is permitted. However, Monongalia and Harrison commonly employ subcontractors, and questions regarding the permissibility of their work are longstanding points of contention between the employers and the UMWA. Union members at Monongalia and Harrison file grievances regarding subcontracting frequently, and these disputes have led to more than fifteen arbitrations during the life of the NBCWA. Stip. at 13; *see* JX 6 at 264-72 (containing the contractual dispute resolution system).

To determine whether to initiate such a grievance – and, if one is filed, to determine the damages owed to bargaining-unit employees – the Local needs information from the employer regarding the work that subcontractors perform, the number of subcontractors employed on a given project, and how long it takes them to complete the work. Accordingly, Local Vice President and agent Jeff Reel emailed a request to Respondents' Human Resources Manager and agent Jim Travelstead on January 23, 2018, asking for "All invoice (*sic*.) for contractors number of contractors and all work performed by contractors from 1/1/18 to present." JX 7; Stip. at 7, 9. Reel specified that the Local requested the information "for the purpose of determining the need to file a grievance and/or to determine if one has merit" and that the request was to facilitate "contract enforcement." JX 7. Travelstead did not provide the information. Reel emailed substantially identical requests to Travelstead on January 29, 2018 (requesting subcontractor information for January 22, 2018 through January 29, 2018; on January 31, 2018 (covering the period from January 1, 2018 through January 31, 2018); February 6, 2018 (covering January 1, 2018 through February 6, 2018); twice on February 12, 2018 (covering January 1, 2018 through February 4, 2018 and February 5, 2018 through February 12, 2018); February 15, 2018 (covering January 1, 2018 through February 15, 2018); and February 19, 2018 (covering February 12, 2018 through February 19, 2018); JX 9; JX 10; JX 13; JX 15(b); JX 16; JX 18; Stip. at 9-10. Travelstead did not provide any of the requested information, and the Respondents have not provided it to date.

Instead, Murray/Monongalia questioned – on January 29, 2018 and January 31, 2018 via Murray attorney and agent Cory Barack – the relevance of the information Reel requested to his stated purposes of deciding whether to file a grievance regarding subcontracting and assessing the merit of any such grievance, along with the relevance of the requested information to the

NBCWA. JX 8, 1/29/18 Letter from Cory Barack to Jeff Reel; JX 11, 1/31/18 Letter from Cory Barack to Jeff Reel; Stip. at 7, 9. In response, Reel explained clearly that "[t]he requested information provides the Union with the information needed to determine if Management has violated any of the provisions of" the NBCWA article governing subcontracting. JX 12, Email from Jeff Reel to Cory Barack (hereinafter "JX 12"); Stip. at 9. Reel elaborated, stating that the UMWA would use the requested information to decide whether – in the Union's view – Murray/Monongalia had violated the agreed-upon subcontracting restrictions and to determine the compensation due to bargaining-unit employees as a result of their displacement by subcontractors. *Id*.

At first, Barack appeared satisfied, writing to Reel that management was in the process of compiling the requested information. JX 14, 2/9/18 Letter from Cory Barack to Jeff Reel (hereinafter "JX 14"); Stip. at 10. Five days later, however, Barack wrote again to Reel and claimed – without evidence – that the Local's requests were "unduly burdensome" and "unduly onerous." JX 17 at 1; Stip. at 10. Barack demanded to "balance" the Local's interest in obtaining the requested information with Murray/Monongalia's alleged interest in conserving "the time, effort and expense involved in responding…" JX 17 at 1. Further, Barack accused the Local of "refus[ing] to engage with the Company" regarding its demand that the Local "narrow the scope" of its requests "to a particular contractor, project or a pending grievance" in order to receive any of the information that Reel asked for. *Id*. Barack then conditioned the fulfillment of the Local's requests on the UMWA bearing "the cost of assembling the responses," including "hourly pay for the time of the individuals engaged in assembling the information and the costs of making copies…" *Id*. at 2. Notably, however, Barack made clear that he understood the relevance of

Reel's requests by citing the NBCWA subcontracting restrictions to which they pertained. *Id*. at 1.

In response, on February 15, 2018, Reel directed Barack's attention to his prior clarifications of the purpose of the information that the Local requested. JX 15(a); Stip. at 10. He explained further that because information regarding the activities of subcontractors was in Murray/Monongalia's sole possession, the only way the Local could police compliance with the NBCWA's subcontracting restrictions was by requesting the type of information that the Local sought. Reel also disputed Barack's allegations regarding the burden imposed by the Local's requests, noting that should be readily accessible as a result of Murray/Monongalia's need to hire and manage its subcontractors. He cited the NBCWA subcontracting provision to which the Local's requests pertained and asked Barack to provide subcontractor information covering the period from January 1, 2018 through February 15, 2018. *Id*.

Rather than provide the requested information, Barack continued to demand that the UMWA bear the cost of its responses. JX 19; Stip. at 11. When Reel asked him to "identify any particular request they consider burdensome, what part of the request is burdensome and why, and an itemized estimate of the costs of furnishing the information," Barack did not do so. JX 20, 2/21/18 Email from Jeff Reel to Cory Barack; Stip. at 11. Instead, Barack wrote to the District, alleging again that Reel's requests posed an "undue burden" and stating that Murray/Monongalia would not provide the requested information unless the UMWA limited its requests "to some particular type of work, contractor, project, or pending grievance" or else agreed to pay the entire cost of the company's response. JX 21 at 1; Stip. at 11. Barack provided only two examples of the supposed burden imposed by the Local's requests, stating that Murray/Monongalia had spent $299.25 compiling subcontractor information covering the period between January 1, 2018 and

February 28, 2018. JX 21 at 1-2. Notably, despite assembling this information, Murray/Monongalia did not provide it and has not provided it to date. Instead, the company – despite earning over $100 million in annual revenues – continues, effectively, to hold the information for a $300.00 ransom. Stip. at 5.

Barack demanded that the UMWA negotiate a cost-sharing plan regarding the Local's requests. JX 21 at 2. Recognizing that the UMWA was not required to engage in such bargaining, the Union apprised Barack on March 16, 2018 – via UMWA Associate General Counsel and agent Kevin Fagan – that the Union need not discuss the matter absent proof that the requests posed an undue financial burden. JX 22, 3/16/18 Letter from Kevin Fagan to Cory Barack, at 2; Stip. at 7, 11. Notably, the UMWA reiterated in this communication the relevance of the Local's requests to the Union's obligation to police compliance with the subcontracting restrictions contained in the NBCWA. JX 22 at 1.

The UMWA, however, did endeavor to reach an accommodation with the Respondents by suggesting on April 18, 2018 that they notify the Union, in advance of subcontractors arriving at the mines, of "the name of the contractor, the nature of the work that is contracted out, the dates and times the contractor will be on the property, and the exemption you claim under the NBCWA…" to the contractual restrictions on subcontracting. JX 23, 4/18/18 Letter from Kevin Fagan to Cory Barack (hereinafter "JX 23"); Stip. at 11. Such pre-notification, the UMWA explained, should eliminate the need for the Local and other Union entities to make the allegedly burdensome information requests. *Id*. The Respondents did not accept this accommodation, neither in April 2018 nor in August 2018 and March 2019, when the UMWA offered (via Staff Attorney and agent Laura Karr) a pre-drafted form that Murray's subsidiaries could use to accomplish the proposed pre-notification. JX 29, Email from Chuck Donnelly to Mike McKown

(hereinafter "JX 29"); JX 31, Letter from Laura Karr to Cory Barack ("JX 31"); Stip. at 12-13. Instead, the Respondents maintain both their refusal to provide evidence that the Union's requests pose an undue burden and their insistence on cost-sharing, despite admitting that the Act requires no such arrangement. *See* JX 32, Letter from Cory Barack to Laura Karr (stating that cost-sharing "is actually the law throughout federal jurisprudence ***except before the National Labor Relations Board***…" (emphasis added)); Stip. at 13.

Meanwhile, the District – via Representative and agent Mike Phillippi – attempted to resolve Murray/Monongalia's concerns regarding the alleged lack of specificity in certain of the Local's requests. On April 4, 2018, Phillippi specified that the requests sought information the UMWA needed to process its grievance number 1702-31-18 regarding subcontractors performing bargaining-unit work, among other disputes and purposes. JX 24, Email from Mike Phillippi to Cory Barack, at 1; JX 25, Grievance Form 1702-31-18; Stip. at 11-12. The District also endeavored to resolve similar concerns raised by Murray/Harrison, noting that the Union had requested information necessary to process grievances PP-4-18 and PP-5-18, among other disputes and purposes. These grievances likewise concerned subcontractors performing bargaining-unit work. *Id.*; *see also* JX 26, Grievance Form PP-4-18 and JX 27, Grievance Form PP-5-18. Murray/Harrison eventually provided the information requested regarding grievance PP-4-18 but delayed in doing so until May 31, 2018 – four days before the grievance was to be arbitrated. Stip. at 12.

Further, the Respondents continued to refuse to provide the subcontractor information that the UMWA had asked for via broad-based requests to Monongalia and Harrison. The Respondents also continued to condition the Union's access to the information on bargaining over cost-sharing. JX 28, Letter from Cory Barack to Mike Phillippi; Stip. at 12. Harrison

persisted with these arguments into January and March 2019, claiming that requests made by the UMWA local union that represented Harrison employees – requests similar to the ones that Reel made to Monongalia – were insufficiently specific and posed an undue burden, and demanding that the UMWA bear the cost of Harrison's response. JX 30(a), 1/28/19 Letter from Cory Barack to Matthew Miller (hereinafter "JX 30(a)"), at 1; JX 30(b), 3/5/19 Letter from Cory Barack to Matthew Miller (hereinafter "JX 30(b)"), at 1; Stip. at 12-13. In each of these communications, Harrison demonstrated its understanding of the relevance of the Union's requests by citing the NBCWA's restrictions on subcontracting. JX 30(a) at 1; JX 30(b) at 1.

With the exception of the information that the District requested regarding grievance PP-4-18, which Phillippi received nearly two months after his request, the Respondents have yet to provide any of the requested information discussed above.

III. LEGAL STANDARD

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with representatives of its employees." § 185(a)(5).[2] The employer's bargaining duty extends to "a general duty to provide information needed by the bargaining representative in contract negotiations and administration." *Murray Am. Energy, Inc.*, 366 NLRB No. 80 at *24 (2018) (*quoting A-1 Door & Building Solutions*, 355 NLRB 499, 500 (2011), *enf'd in part sub nom. Plaza Auto Center, Inc. v. NLRB*, 664 F.3d 286 (9th Cir. 2011) *and supplemented sub nom. Plaza Auto Center, Inc.*, 360 NLRB 972 (2014) (internal citations omitted)). That is, the employer must "supply a union with requested information that will enable

[2] "It is settled that an employer's violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1) of the Act." *Graymont PA, Inc.*, 364 NLRB No. 37 at *20 n.7 (2016) (*citing Tenn. Coach Co.*, 115 NLRB 677, 679 (1956), *enf'd sub nom. NLRB v. Tenn. Coach Co.*, 327 F.2d 907 (6th Cir. 1956), *and ABF Freight Sys.*, 325 NLRB 546, 562 n.3 (1998)).

[the union] to negotiate effectively and to perform properly its other duties as bargaining representative." *NY & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011) (*quoting Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983) (internal quotation omitted)). Among these "other duties" is "the duty 'to see to it that an employer meets its [collective bargaining agreement] obligations.'" *Id*. (*quoting Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 648 F.2d 18, 25 (D.C. Cir. 1980). Also included is "the decision" of whether "to file or process grievances." *Disneyland Park*, 350 NLRB 1256, 1257 (2007) (*citing Beth Abraham Health Servs.*, 332 NLRB 1234 (2000)); *see also W-L Moulding Co.*, 272 NLRB 1239, 1241 (1984) (*quoting Rockwell-Standard Corp.*, 166 NLRB 124, 132 (1967), *enf'd sub nom. NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969) *and citing Curtiss-Wright Corp.*, 145 NLRB 152, 153-54 (1963), *enf'd sub nom. Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965)) (stating, "the Union's statutory function of policing the collective-bargaining agreement…includes…'evaluat[ing] a possible grievance'").

The employer, therefore, must provide the union any information that it requests that is relevant to the union's role as the enforcer and administrator of the collective bargaining agreement. Information regarding employees who are not bargaining unit members is not presumptively relevant to the union's representational duties, and the union must therefore prove its relevance. *Murray Am. Energy*, 366 NLRB at *24 (*quoting A-1 Door & Building Solutions*, 356 NLRB at 500 (internal citation omitted)). The union, however, does not carry a heavy burden in this regard. *Id*. (*citing Leland Stanford Junior Univ.*, 262 NLRB 136, 139 (1982), *enf'd sub nom. NLRB v. Leland Stanford Junior Univ.*, 715 F.2d 473 (9th Cir. 1983) *and Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994)). Instead, the Board applies "a broad, discovery-type of standard" under which "a party must disclose information if it has any bearing on the

subject matter of the case." *Id*. (*quoting Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006), *supplemented*, 2007 WL 1459443 (NLRB May 14, 2007) (Shamwell, ALJ)); *Leland Stanford Junior Univ.*, 262 NLRB at 139 (*quoting Local 13, Detroit Newspaper & Printing & Graphic Commc'ns Union v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979)).

All the union need show is that the requested information "is of 'probable' or 'potential' relevance" to its representational responsibilities. *Murray Am. Energy*, 366 NLRB at *24 (*quoting Transp. of New Jersey*, 233 NLRB 694, 694 (1977) (internal citation omitted)). "The union need not demonstrate 'the existence of some particular controversy or the need to dispose of some recognized problem.'" *NY & Presbyterian Hosp.*, 649 F.3d at 730 (*quoting Oil, Chem. & Atomic Workers*, 711 F.2d at 361). That is, "the union need not demonstrate actual instances of contractual violations before the employer must supply information…nor must the bargaining agent show that the information which triggered its request is accurate, nonhearsay, or even ultimately reliable." *W-L Moulding Co.*, 272 NLRB at 1240 (*quoting Boyers Constr. Co.*, 267 NLRB 227, 229 (1983)). Further, "the information need not be dispositive of" some "issue between the parties but must merely have some bearing on it." *Murray Am. Energy*, 366 NLRB at *24 (*quoting Pa. Power & Light Co.*, 301 NLRB 1104, 1105 (1991)). In the alternative, even if the union does not state the relevance of the requested information clearly at the time of its request, the employer must furnish the information if its relevance "should have been apparent to the [employer] under the circumstances." *Centura Health*, 368 NLRB No. 51 at *6 (2019) (*citing Disneyland Park*, 350 NLRB 1256, 1258 (2007)). As long as there exists "the possibility that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities," the employer is bound to provide it. *Id*. (*quoting W-L Moulding Co.*, 272 NLRB at 1240 (internal citations omitted)).

As a result, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act." *Id.* (*quoting Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975)). Likewise, "[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Id.* (*quoting Monmouth Care Ctr.*, 354 NLRB 11, 41 (2009), *reaff'd*, 356 NLRB 152 (2010), *enf'd sub nom. Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085 (D.C. Cir. 2012)). The Act requires the employer to make "a reasonable good faith effort to respond as promptly as circumstances allow." *Id.* (*quoting Good Life Beverage Co.*, 312 NLRB 1060, 1062 n.9 (1993)).

IV. ARGUMENT

A. The Respondents' failure to provide the information the UMWA requested is an unfair labor practice.

It is clear that the Respondents' non-replies to the majority of the Union's information requests in this case violated Section 8(a)(5) because the Board, affirmed by the U.S. Court of Appeals for the District of Columbia Circuit, has held that the information sought in requests substantially identical to the ones at issue here was relevant to the Union's representational duties and that the company was therefore obligated to provide it. In *Murray American Energy*, Phillippi requested the following from Murray/Monongalia on March 28, 2016:

> (1) Copies of all invoices, bills, and any other document submitted by ANY contractor describing the type and duration of any work performed by a contractor at any time between July, 2015 and present;
> (2) Copies of all Bid Forms, Estimates, Offers or any other document describing the nature, extent, type and duration of the work to be done submitted by a contractor for work to be done at the mine at any time between July 2015 and the present[.]

366 NLRB at *28 (emphasis in original). Phillippi stated that he requested the information "to ensure contract compliance and to decide whether to file grievances"; in other words, the

UMWA "believe[d] management was violating the contract and put out an information request to find out." *Id*. The Union's belief that Murray/Monongalia's might have engaged in impermissible subcontracting was based both on "several arbitration rulings where the Employer had been found to have been using contractors" in violation of the NBCWA, "as well as employees coming to the Union with suspicions that contractors on the property had been performing bargaining unit work." *Id*.

Murray/Monongalia did not provide the requested information. Instead, the company claimed that Phillippi's request was "burdensome" and objected to the fact that it was "not specific to any grievance or arbitration." *Id*. at *28-29. Murray/Monongalia demanded that Phillippi "narrow your requests for information down to a specific date, grievant, contractor, project, etc." *Id*. at *29. Notably, Murray/Monongalia's "use of contractors was a frequent source of disputes with the Union" and "was the source of many grievances, and multiple arbitrations." *Id*.

Under these circumstances, the Board held that "the relevance of [Phillippi's] request should have been apparent" and that, in any event, Phillippi had explained to Murray/Monongalia that the UMWA needed the requested information "to monitor and ensure compliance with our contract" and "to assess 'what if any action need be taken'" to preserve Union members' rights to the work guaranteed to them in the NBCWA. *Id*. The UMWA, therefore, had "satisfied its duty to show the relevance of its request to its representational duties." *Id*. at *30. The Board held further:

> The Union is not limited to requesting information for specifically named or even specifically-contemplated grievances, or requests for specifically referenced incidents. The Union's right to knowledge-based representation and bargaining is not a stingily-dispensed right, but rather, a right central to the Act, and part of the promise of union representation.

Id. Therefore, "[g]iven the multiple contract provisions regulating subcontracting, given the multiple arbitrations, grievances and disputes that have arisen between the parties regarding subcontracting, the Union is well within its rights under the Act" to seek the requested information in order to fulfill its representational responsibilities to its members. *Id*. As a result, Murray/Monongalia violated Sections 8(a)(1) and 8(a)(5) by failing to provide the information. *Id*. at *31.

The Board did not credit Murray/Monongalia's claim of being saddled with undue burdens as a result of Phillippi's request, holding that "the Respondent has to do more than assert burdensomeness – it has the 'burden of proving its contention that providing the requested information would be overly burdensome'"; therefore, the company's "blanket assertion" regarding its burden was insufficient. *Id*. at *30 (*quoting Mission Foods*, 345 NLRB 788, 789 (2005)). Even if Murray/Monongalia had presented evidence of its supposed burden, the company still would have been required "to seek an accommodation with the Union," such as by making an effort to supply some of the requested information "and document[ing] to the Union the reasons why some of the request could not be met." *Id*. (*citing Goodyear Atomic Corp.*, 266 NLRB 890, 891 (1993), *enf'd sub nom. Goodyear Atomic Corp. v. NLRB*, 738 F.2d 155 (6th Cir. 1984)). However, Murray/Monongalia's demand that Phillippi narrow his request, "as a condition for…be[ing] willing to provide anything," did "not amount to a good-faith effort" in this regard because it asked Phillippi to supply "precisely the type of information that the Union did not have and was seeking." *Id*. As a result, the company's defense was unavailing.

This case clearly falls within the ambit of *Murray American Energy*. Similarly to Phillippi, Reel asked Murray/Monongalia – on multiple occasions – for subcontractor invoices, workforce sizes, and job descriptions pertaining to periods of between six and forty-six days. JX

9; JX 10; JX 13; JX 15(a); JX 15(b); JX 16; JX 18. Two of these items, invoices and job descriptions, were specifically contained in Phillippi's request. The other, workforce sizes, falls within the same general category of information that Phillippi sought: information that would reveal the nature and scope of the subcontractors' work. Notably, even the longest, forty-six day period covered by the most extensive of Reel's requests was much shorter than the nearly nine-month period to which Phillippi's request referred. While the stipulated record in this case does not contain the Union's requests to Murray/Harrison, one can readily infer that they were substantially similar to the UMWA requests to Murray/Monongalia based on Phillippi's description of both sets of requests as "deal[ing] with contractors" and pertaining to subcontractors' personnel, work assignments, and invoices. JX 24 at 2.

Further, as with Phillippi's request in *Murray American Energy*, the UMWA clearly explained to the Respondents the relevance of the information at issue in this case. In each of Reel's requests, he stated that the UMWA needed the information to enforce the NBCWA by determining whether to file a grievance regarding subcontracting and/or deciding whether an existing grievance or grievances had merit. JX 9; JX 10; JX 13; JX 15(b); JX 16; JX 18. When Murray/Monongalia requested further clarification, Reel explained that the UMWA needed the information to determine whether the company had violated Article 1 of the NBCWA, which governs subcontracting.[3] JX 12; JX 15(a). For good measure, Phillippi offered examples of individual grievances to which the Union's requests to Murray/Monongalia and Murray/Harrison

[3] The Board has held frequently that when a union requests subcontractor information and cites to the employer the contractual provision governing subcontracting, the union has provided adequate notice of the relevance of its request. *See, e.g., U.S. Postal Serv.*, 364 NLRB No. 27 at *23 (2016) *reconsideration denied,* 2016 WL 4502618 (NLRB Aug. 26, 2016) (holding that after giving such notice, the union was entitled to any subcontractor information "necessary to determine whether to file or to continue processing of a grievance…").

were relevant. JX 24. The Respondents clearly understood and accepted these explanations; they proceeded to begin compiling the requested information and later cited the applicable NBCWA articles in communications objecting to the Union's requests. JX 14; JX 17; JX 30(a); JX 30(b). Also as in *Murray American Energy*, the Respondents were on notice of the relevance of the Union's requests due to the extensive NBCWA restrictions on subcontracting and the prevalence of disputes between the parties regarding their application.[4] JX 6 at 7-8; Stip. at 13. Notably, the Respondents have not made the relevance of the Union's requests an issue in this litigation. Stip. at 14.

Likewise, both in *Murray American Energy* and here, the company claimed that the Union's requests posed an undue burden and were impermissibly vague, and the company demanded that the UMWA narrow them to particular subcontractors, projects, and/or grievances. JX 17; JX 21; JX 30(a); JX 30(b); JX 32. Yet, when Reel asked Barack to identify the allegedly burdensome requests and explain their adverse impact on the company, Barack identified only one purported problematic request and made the preposterous claim that the nearly $300.00 expense associated with responding to it was somehow burdened the large and wealthy Respondents. JX 21. In light of the Respondents' revenues, this claim cannot be taken seriously as proof of an undue burden – which proof the Respondents did not and have not provided.

Further, the Respondents made no effort to reach an accommodation with the UMWA. Instead, the Union attempted to reach an accommodation by proposing a system through which the Respondents could eliminate the need for broad-based information requests regarding

[4] The existence of a contractual provision restricting subcontracting makes the relevance of a union's request for subcontractor information self-evident to the employer. *See U.S. Postal Serv.*, 364 NLRB at *23 (holding such a restrictive contract provision, along with memoranda of understanding on the subject of contracting, to be proof of the *per se* relevance of the union's request for subcontractor information).

subcontractors by notifying the UMWA of their presence and planned activities in advance, but the Respondents did not accept it. JX 23; JX 29; JX 31. In addition, despite compiling at least a portion of the information that the UMWA requested, the Respondents made no effort, in good faith or otherwise, to provide any of it to the Union. Instead, the Respondents continue to demand – as a condition of providing any of the requested information at all – that the UMWA put forward "precisely the type of information that the Union [does] not have and [is] seeking." It is patently impossible for the UMWA to do so.

Plainly, the facts and circumstances of *Murray American Energy* and this case are nearly identical. The same holding, therefore, should result – that the UMWA requested relevant information, that the Act obligates the Respondents to provide it, that they have not proven the existence of an undue burden or made a good-faith effort to reach the required accommodation with the UMWA, and that the Respondents have, accordingly, violated Sections 8(a)(1) and 8(a)(5). This result is consistent with the Board's longstanding practice of requiring employers to provide to unions information regarding subcontractors' requests for proposals, subcontracting agreements, correspondence, records, invoices, and other financial information in order to fulfill the unions' representational duties. *U.S. Postal Serv.*, 364 NLRB at *19 (*citing Nat'l Grid USA Serv. Co., Inc.*, 348 NLRB 1235, 1246-47 (2006); *Ormet Aluminum Mill Prods. Corp.*, 335 NLRB 788, 802 (2001); *ATC/Vancom of Nev.*, 326 NLRB 1432, 1433 (1998); *and A.O. Smith Corp.*, 223 NLRB 838, 841 (1976)); *Garcia Trucking Serv., Inc.*, 342 NLRB 764, 767 (2004); *see also AMCAR Div'n, ACF Indus., Inc. v. NLRB*, 592 F.2d 422, 432 (8th Cir. 1979) (finding that without the information the union requested regarding subcontractors' job descriptions and work hours, "the union had no idea of the frequency of subcontracting, the amount and type of work involved, and the effect it might have had on the bargaining unit") *and Pratt & Lambert,*

Inc., 319 NLRB 529, 533 (1995) (holding that the union needed information about subcontractors' job descriptions and work hours to find out whether the employer had awarded bargaining unit work to the subcontractors and to determine the extent of impermissible work they had performed).[5] It is also consistent with past decisions holding that a union need not tailor its requests for subcontractor information to particular subcontractors and/or jobs. *See, e.g.*, *Pratt & Lambert*, 319 NLRB at 534 (stating, "Cleary, such information is not in the Union's possession and constitutes an unreasonable request").

Murray/Harrison's nearly two-month-long delay in providing the information Phillippi requested in this case in order to process UMWA grievance number PP-4-18 was likewise a clear violation of Sections 8(a)(1) and 8(a)(5). Stip. at 12; see *Murray Am. Energy*, 366 NLRB at *24 (finding that "[a]n unreasonable delay in furnishing [requested] information" violated Section 8(a)(5) (internal citation omitted)). The length of Murray/Harrison's delay is well within the range that the Board has held to be unlawful. *See, e.g.*, *Monmouth Care Ctr.*, 354 NLRB at 52 (finding a delay of forty-two days to violate the Act and stating that the employer was obligated to provide relevant information "as promptly as possible"). While the Board does not define a certain length of delay that will constitute a per se violation of the Act, Murray/Harrison was required to make "a reasonable good-faith effort to respond to the request as promptly as circumstances allow." *Silver Bros. Co., Inc.*, 312 NLRB 1060, 1062 n.9 (1993) (*citing E.I. DuPont & Co.*, 291 NLRB 759, 759 n. 1 (1988)). Here, Phillippi explained to Barack – and the

[5] The limitations on union information requests regarding subcontractors stated in *Disneyland Park* do not apply inasmuch as the NBCWA substantially restricts subcontracting, while the contract in *Disneyland Park* allowed it under most circumstances. 350 NLRB at 1256 (stating that subcontracting was permitted when it did not result in termination, layoff, or failure to recall); *Murray Am. Energy*, 366 NLRB at *30 (holding that Disneyland Park does not apply to requests for subcontractor information under the NBCWA because the NBCWA is "replete with subcontracting limitations").

Respondents have not disputed, despite Phillippi's invitation to Barack to "provide evidence to the contrary," if such evidence exists – that the requested information is "easily obtainable by management" inasmuch as the Respondents provide written work assignments to subcontractors and collects price quotes, time sheets, and invoices from them. JX 24 at 2. Given these facts, Murray/Harrison's delay in providing the information relevant to grievance PP-4-18 was unreasonable and violated the Act.

B. The UMWA was not required to adjust its requests to meet the Respondents' demands.

The Respondents argue that they were excused from responding to the Union's requests for relevant subcontractor information because the UMWA neither agreed to narrow the scope of such requests nor engaged in bargaining over sharing the costs of the companies' responses. Stip. at 14. The Act does not support either of these claims.

First, the Board has clearly held that under circumstances like the ones in this case, a union is not required to narrow the scope of its information requests for the employer's convenience. *Murray American Energy*, for example, finds that Murray/Monongalia's demand that Phillippi limit his requests for subcontractor information "to 'a specific date, grievance, contractor, project, etc.'" did not qualify as "a good-faith effort to reach [the] mutually acceptable accommodation" that was required because it amounted to a demand that Phillippi provide the very information he was seeking from the company – which he plainly did not have. 366 NLRB at *30. Absent an offer from Murray/Monongalia to produce or at least search for some of the requested information, along with documentation of "the reasons that some of the request could not be met," Phillippi had no obligation to modify his request. *Id*. Given that Murray/Monongalia conditioned its willingness to provide any of the information at all on

Phillippi's ability to do the impossible by producing information not in his possession, the far-reaching extent of his request was irrelevant to the company's obligation to fulfill it. *Id*.

This case is nearly identical to *Murray American Energy* for the reasons discussed in Section IV(A), *supra*. Specifically, the Respondents in this matter demanded that the UMWA narrow its broad-based requests for subcontractor information but made no good-faith offer to accommodate the requests and, in fact, refused the Union's own proffered accommodation.[6] JX 17; JX 21; JX 23; JX 29; JX 30(a); JX 30(b); JX 31; JX 32. Notably, the UMWA was under no obligation to offer an accommodation to the Respondents but did so anyway in an effort to promote productive compromise. Further, the UMWA could not narrow its request without knowledge of which subcontractors had performed work at Monongalia and Harrison, how many subcontractor employees had participated, and what those employees had done – which was the exact information the Union had requested from the Respondents in the first place. Under these circumstances, the UMWA need not – and indeed could not – reduce the scope of its requests. Therefore, the same conclusion that the Board reached in Murray American Energy should apply. *C.f. United Parcel Serv. of Am., Inc.*, 362 NLRB 160, 160-63 (2015) (finding that when certain information requested by the union was irrelevant, and the employer offered to accommodate the request by providing less-voluminous information and engaging in dialogue regarding relevance, the union was required to consider the employer's offer and engage in discussion).

[6] To the extent that the Respondents offered anything that even arguably could be described as an accommodation, that offer consisted of asking the UMWA to decide between narrowing its requests or bearing the entire cost of the company's response. JX 17; JX 21; JX 30(a); JX 30(b). Because the UMWA could not narrow its request and, in any event, was not required to take either action in order to secure access to the requested information, for the reasons discussed *infra*, the Respondents' offer represents an effort to frustrate good-faith bargaining rather than a genuine attempt to fulfill their responsibilities under the Act.

The facts of this case are also markedly similar to those of *Pratt & Lambert*, where the union requested from the employer, among other items, an accounting of the hours worked by subcontractors in a certain department and a description of those subcontractors' work over a period of more than four-and-a-half years. 319 NLRB at 532. The employer objected, claiming that the request was overly vague and unreasonable, and demanding that the union narrow it "to specific contractors and engagements." *Id*. at 531. Specifically, the employer asked the union to "supply…the names of the [subcontractors], their numbers, and the specific jobs that the contractors did." *Id*. at 534. "Clearly," the Board found, "such information is not in the Union's possession" and the employer's demand "constitutes an unreasonable request." *Id*. The UMWA likewise made broad-based requests for subcontractor information, and the fact of the requests themselves demonstrates that the Union lacked sufficient information to narrow its requests to certain subcontractors or types of work. The Respondents' demand that the UMWA do so was therefore unreasonable, and the Union need not (and could not) comply.

Second, under the circumstances present in this case, the UMWA was not obligated to bargain regarding the allocation of the costs that the Respondents would incur in providing the information that the Union requested. On numerous occasions, the Respondents made vague and unsupported claims that the Union's requests were burdensome and would impose some unknown expense on the Respondents in the form of staff time and copying costs. JX 17; JX 30(a); JX 30(b). They also repeatedly conditioned the Union's ability to receive the information – or, in some cases, the Respondents' willingness to even *consider* providing the information – on the Union's agreement to pay the Respondents' entire cost of producing it. JX 17 at 2; JX 21 at 1; JX 30(a) at 1; JX 30(b) at 1. Additionally, the Respondents demanded that the UMWA bargain regarding cost-sharing, and they informed the Union that "the only reason the UMWA

has not received responses to the [subcontracting] requests…is because the Union has refused to bargain over cost sharing." JX 28; *see also* JX 21 (demanding that the UMWA meet to bargain regarding cost-sharing).

Importantly, however, the Respondents did not disclose their anticipated costs from providing the information that the UMWA requested, thereby asking the Union to "commit itself in advance to paying an undisclosed amount for copying and administrative fees" – which it was not obligated to do.[7] *Tower Books*, 273 NLRB 671, 671 (1984), *enf'd sub nom. Queen Anne Record Sales, Inc. v. NLRB*, 772 F.2d 913 (9th Cir. 1985). By extension, the Respondents did not prove that providing the requested information would be financially burdensome, which is a requirement for an employer that wishes to pass on to a union a portion of the cost of providing relevant information that the union requested, or even to discuss the allocation of costs with the union. *See id*. at 671 n.5 (*citing Food Employers Council*, 197 NLRB 651 (1972)) (holding, "there is indeed a sound basis in law for the Union's request that the Respondent demonstrate a burdensome financial impact before the Union would discuss costs" of responding to information requests); *see also Beverly Health & Rehab. Servs., Inc.*, 346 NLRB 1319, 1327 (2006), *overruled on other grounds by E.I. DuPont de Nemours, Louisville Works*, 364 NLRB No. 113 (2016) (finding, "It is the Respondent's burden to show that the production of the information requested by the Union was unduly burdensome" (internal citations omitted)) *and I. Appel Corp.*, 308 NLRB 425, 442 (1992), *enf'd sub nom. NLRB v. I. Appel Corp.*, 19 F.3d 1433 (6th Cir. 1994) (stating that an employer claiming to be cost-burdened by a union's information requests

[7] Although the Respondents quoted a cost of nearly $300.00 for responding to one of Reel's requests, at no point did they provide a comprehensive cost estimate for responding to the Union's requests in total. JX 21.

must "establish[ ] the truth of such contentions). Without a comprehensive accounting of expected costs from the Respondents, they could not – and did not – show that such costs would impose an undue burden.[8] While it may be that "[i]f there are substantial costs" associated with the Respondents' provision of the requested subcontractor information, "the parties must bargain" as to the allocation of those costs, this conclusion does not apply here because the Respondents have failed to offer any proof at all of such substantial costs or the purported burden that they impose. *Food Employer Council*, 197 NLRB at 651. Under these circumstances, the UMWA was not required to bargain regarding cost-sharing, and the Respondents violated Sections 8(a)(1) and 8(a)(5) by refusing to provide the requested information in the absence of such bargaining (or, in the alternative, of the Union's agreement to assume the entirety of the Respondents' costs). *See Hosp. Episcopal San Lucas*, 319 NLRB 54, 57 (1995) (holding that the union need bargain over cost-sharing only if the employer could demonstrate a financial burden and that, in the absence of such demonstration, the employer violated the Act).

V. CONCLUSION

The Respondents, despite the substantial restrictions on subcontracting contained in the NBCWA, maintain subcontracting practices that appear to the UMWA to violate the parties' bargained-for work jurisdiction provisions. Faced with the apparent dilution of its members' rights to most of the coal production work at Monongalia and Harrison, the UMWA made a number of requests for information about the subcontractors and their work that would allow the Union to determine whether the Respondents had in fact violated the NBCWA. This information was relevant to the Union's responsibility to police the Respondents' compliance with the

[8] The Charging Parties to not admit and specifically reject the idea that the Union's requests could pose an undue financial burden on the Respondents, given their revenues.

contract, and it was necessary for the UMWA to fulfill its representational duties to its members. Yet, rather than meet their own responsibilities under the Act, the Respondents either delayed unlawfully in providing the information or refused to provide it unless the UMWA either narrowed its requests, agreed to pay the Respondents' costs in full, or bargained regarding cost-sharing. Given that the UMWA lacked the information that would enable the Union to narrow the requests and given the Respondents' failure to prove that the requests posed an undue financial burden, the UMWA was not required to alter its requests for the Respondents' convenience or to pay them for doing what the Act requires. The Respondents, therefore, violated Sections 8(a)(1) and 8(a)(5) in failing to provide the substantial majority of the information that the UMWA requested and in delaying unacceptably in providing the rest.

Accordingly, the Board should order the Respondents to fulfill all outstanding UMWA information requests that are at issue in this case, post a notice affirming their employees' rights in this regard, and take any other remedial action that the Board finds appropriate – thereby complying with the Act's mandate that they bargain in good faith and restoring to UMWA members the full "promise of union representation" that the law guarantees to them.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

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